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No. 84-1708

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE OKLAHOMA PUBLISHING COMPANY,
Petitioner,

v.

OKLAHOMA HOSPITAL ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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Respondents Oklahoma Hospital Association, *et al.*, (OHA) contend that this case involves no more than the district court putting its imprimatur on a private agreement between OHA and the Oklahoma Department of Human Services (DHS) to exchange documents before settling a lawsuit. OHA contends that the public and the press do not have standing to question whether the district court acted in compliance with the Federal Rules of Civil Procedure or whether the contents of the documents in fact justified secreting them from public view.

If the decision below stands, the public will have lost—lost its right to examine documents which were the basis of millions of public dollars being paid to the Respondents, lost its right to assess the propriety of decisions made by public officials, and lost its right to determine whether the

judicial system has functioned properly. Preventing the press, and therefore the public, from challenging protective orders will lead only to more "private" agreements, ratified by courts, closing the judicial process to public view. This is not what the Federal Rules of Civil Procedure intended, nor does it comport with numerous decisions of this Court and other courts of appeals.

I. OPUBCO HAS STANDING TO CHALLENGE THE PROTECTIVE ORDERS

OHA's argument that Petitioner The Oklahoma Publishing Company (OPUBCO) lacks standing to challenge the protective orders ignores the irrefutable fact that this is the only reported case in which the press has been refused the opportunity to challenge a court's closure or protective order. As OPUBCO showed in its Petition for Certiorari, at 11-13, courts consistently have allowed the press to argue against such orders. The decision in the very case on which OHA relies, *In re Agent Orange Product Liability Litigation*, 96 F.R.D. 582 (E.D.N.Y. 1983) (Brief in Opp. at 10, 12), was on the merits of the press' claim that documents should be open to the public. The court there did not question the press' standing to make such an argument.

OHA argues that OPUBCO erred in citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); and *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979), since "each involved the press' standing to challenge the closure of a public proceeding." Brief in Opp. at 7. In fact, in each case the proceedings were as "private" as the one at bar until, in two instances, this Court ordered them opened. In none of these cases was the press' standing to object to the trial court's order even challenged.

To argue that the press and public cannot contest a closure order because it pertains to a "private" instead of a "public" document or proceeding is to presuppose the answer to the very question in dispute. *See, e.g.*, Brief in

Opp. at 9. If orders sealing documents cannot be challenged because the documents withheld from view become, by definition, "private," this Court's rulings in *Globe Newspapers*, *Richmond Newspapers*, and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), would be meaningless.

OPUBCO argues that the orders must be vacated because they were not issued in accord with Fed. R. Civ. P. 26(c). While the protective orders are in place, OPUBCO and the public are barred from knowing the contents of documents which OHA contends support the payment to its members of millions of dollars in public funds. Counsel for DHS has affirmed that access to the documents will be afforded OPUBCO if the protective orders are vacated. *See* Pet. for Cert. at 15 n.16. Since DHS has indicated that the documents would be released, OPUBCO is entitled to seek removal of the protective orders. DHS's repeated argument that OPUBCO's claim is either overbroad or ineffectual is therefore misplaced.[1]

Keeping secret the documents in dispute make purposeless OHA's assertion that OPUBCO is free to publish whatever it learns through other means. The explanation for DHS's decision to settle a lawsuit and to pay millions of public dollars to OHA's members is locked in unavailable documents. So long as OPUBCO cannot even challenge the decision making these documents inaccessible to the public, the public will remain uninformed.

Similarly, it is disingenuous for OHA to imply that because certain portions of the underlying litigation were open to the public, it is unnecessary for OPUBCO to view

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[1] As OPUBCO pointed out (Pet. for Cert. at 16-18), under Fed. R. Civ. P. 5(d), added in 1980, the district court has the authority to order that materials produced in discovery be filed in court, for the express purpose of making them available to non-parties. Contrary to OHA, the decision whether or not the public may have access to discovery materials is not one belonging exclusively to the parties.

the documents in question. *See* Brief in Opp. at 9-10. OHA again relies on its self-created distinction between "public" and "private" records to claim that OPUBCO lacks standing because it is an unwelcome interloper into a two-party agreement. Court after court has recognized that the press, as surrogate for the public, is entitled to object to closed judicial records and proceedings. Even if OHA and DHS had agreed on the protective orders, they could not agree to prevent the press from challenging that agreement.

Respondents suggest that the touchstone for whether documents produced in discovery are "public" is whether or not they were filed with the court. However, as the advisory committee notes to Fed. R. Civ. P. 5(d) indicate, the decision to dispense with the filing of discovery materials in the normal course was made to conserve courthouse storage space, and not with any intention of effecting a substantive change in the presumptively public character of discovery material. Fed. R. Civ. P. 5(d) advisory committee note (1980); *see* Note, *Access to Pretrial Documents under the First Amendment*, 84 Col. L. Rev. 1813, 1827 (1984). Thus, materials produced in discovery, absent the entry of a valid protective order, are as much "public" as any other part of the judicial process, regardless of whether they were lodged with the court.

II. GOOD CAUSE WAS NOT SHOWN TO SUPPORT THE PROTECTIVE ORDERS

The power of the district court to require production of documents in discovery was activated by Respondents when they filed suit to increase the amount of public funds they would receive. OHA concedes, as it must, that if its case had gone to trial, the documents would have been revealed. It cannot contend that the decision of DHS to settle before trial changed the character and status of the material OHA produced in order to pro-

ceed with its claim. As OPUBCO pointed out above, whether or not the documents were actually filed in court does not affect their status, and the courts have recognized that the presumption of access to judicial records is fully applicable to pretrial proceedings in civil cases. *See In re Continental Illinois Securities Litigation*, 732 F.2d 1302, 1308 (7th Cir. 1984).

OHA claims that OPUBCO has argued for "unrestrained access" to the documents and has attempted to assert the First Amendment rights of the parties in challenging the protective orders. Brief in Opp. at 5. To the contrary, OPUBCO's position is only that the protective orders were issued without any showing of good cause, and that the protective orders thus were improperly maintained in effect.

Given opportunity after opportunity to offer a good cause for an order restricting disclosure, OHA has suggested no more than that the documents are "confidential," *see* Pet. for Cert. at 18, and that an expedited trial schedule was dictated by Eleventh Amendment considerations. Brief in Opp. at 3. A mere assertion of confidentiality is insufficient under Rule 26(c) to justify a protective order. Pet. for Cert. at 18-22. The argument that a desire for an expedited trial obviated the inquiry required by Rule 26(c) is equally unavailing. The district court established a system to review any documents as to which claims of privilege were made during the expedited discovery period. *See id.* at 19 n.20, 18a.[2]

Moreover, protective orders are not immutable. *See American Telephone & Telegraph Co. v. Grady*, 594 F.2d

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[2] OHA in fact did employ this procedure as to a number of documents DHS sought. Moreover, as was indicated at the hearing on OPUBCO's motion, OHA employed six people to review the documents before production. Hearing Transcript at 15. It is unlikely that any further review would have been warranted in the absence of the protective orders.

594, 596 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). As the district court noted in *In re Coordinated Pretrial Proceedings*, 101 F.R.D. 34, 44 (C.D. Cal. 1984), "[u]mbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) . . . ." By the time OPUBCO moved to vacate the protective orders, document production had been completed and a settlement reached. Thus, the reasons asserted by OHA for the protective orders were no longer relevant when the district court acted on OPUBCO's motion. By acting when it did, OPUBCO did not precipitously interrupt orderly procedures or impede discovery. In that situation, the burden of establishing a specific basis for continued protection of discovery documents must fall on the party seeking protection. *Id.* OHA never attempted to meet that burden.

While this Court did state in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199, 2208 (1984), that "pretrial depositions and interrogatories are not public components of a civil trial," this was in the context of a protective order issued with clearly established good cause. That circumstance does not pertain in the instant case.

OHA is incorrect in asserting that *Rhinehart* is dispositive of this case. Brief in Opp. at 1-2. First, *Rhinehart* involved a properly issued protective order. The trial court there initially determined that good cause had not been shown and refused to grant an order. Only when detailed affidavits were submitted explaining the likely harms that would result in the absence of a protective order did the trial court find good cause and enter an order. The dispute in *Rhinehart* was whether, in the context of that order issued after a careful weighing of the Rule 26(c) standards, the First Amendment nonetheless required that disclosure be allowed.

By contrast, in the instant case no evidence of good cause justifying a protective order was ever presented.

See Pet. for Cert. at 18-19. OHA's constant references to "public" records and "private" records, then, assumes the answer to an inquiry not made in this case.[3]

Second, the underlying case in *Rhinehart* was litigation between two private parties over an entirely private dispute. The underlying case here instead involves an action against a public agency which resulted in the payment of millions of dollars of public funds to members of OHA.

OHA argues that it and DHS agreed upon entering the protective orders and that OPUBCO has no right to assert First Amendment rights on behalf of the parties to the underlying action. *Id.* at 3, 5. First, Rule 26(c) requires good cause to be shown before a protective order can be entered, even if the parties have agreed to such an order. Second, OPUBCO's Petition for Certiorari showed that DHS did not willingly agree to enter into and continue in force any such agreement. Third, OPUBCO is not asserting rights of the parties, but instead that the First Amendment rights of the public and press must be considered when a Rule 26(c) protective order is being considered. Despite OHA's contention to the contrary, the record in no way reflects that the district court gave more than cursory consideration to the protective orders, and considered the interests of the public not at all.

Finally, it is difficult to understand OHA's assertion that it is "ludicrous" for this Court to entertain OPUBCO's suggestion that the district court erred in not considering the First Amendment. Brief in Opp. at 13. This Court stated in *Rhinehart* that a protective order

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[3] OHA's contention that the discovery documents here are entirely private is curious. OHA asked the Oklahoma Department of Human Services for millions of dollars in *public* funds. The documents in question are the records which support that claim to public money.

may cause an "impairment of First Amendment rights." 104 S. Ct. at 2207. In Justice Brennan's concurrence he said that this Court "recognizes that pretrial protective orders . . . are subject to scrutiny under the First Amendment." *Id.* at 2210. The decisions below, therefore, are a substantial departure from this Court's balancing of competing interests in *Rhinehart*.

CONCLUSION

The decisions below have the effect of foreclosing any public inquiry into matters in litigation and, what is worse, preventing the press—which this Court has recognized functions as the public's surrogate—from ever challenging the secreting of documents used to support a claim of millions of dollars in public funds. For the foregoing reasons and those stated in the Petition for Writ of Certiorari, the writ should be granted.

Respectfully submitted,

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